UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD [1]

REGION 20

WESTERN AGGREGATES, LLC

Employer

and Case 20-RD-2417

KEVIN BARNETT

Petitioner

and

OPERATING ENGINEERS LOCAL UNION NO. 3,
INTERNATIONAL UNION OF OPERATING ENGINEERS

Union

SUPPLEMENTAL DECISION

On September 2[2], the Acting Regional Director directed an election that was conducted by secret ballot on September 29 in the following appropriate collective-bargaining unit:

> All full-time and regular part-time plant operators, mechanics, equipment operators, laboratory testers and laborers employed by the Employer at its Marysville, California facility; excluding office clerical employees, weighmaster, sales employees, professional employees, managers, guards and supervisors as defined in the Act.

The Tally of Ballots served upon the parties at the conclusion of the election shows:

Approximate number of eligible voters	15
Number of Void ballots	0
Number of Votes cast for labor organization	0

[1] Also referred to as the Board.
[2] All dates refer to 2005 unless otherwise specified.

Number of Votes cast against labor organization 12
Number of Valid votes counted 12
Number of Challenged ballots 0
Number of Valid votes counted plus challenged ballots 12

On October 6, the Union timely filed and served upon the Employer and Petitioner objections to the conduct of the election which state verbatim:

1. The Employer made promises of benefits and other improvements in wages, hours and working conditions or gave such improvements.

2. The Employer refused to bargain in good faith.

3. The Employer maintained unlawful rules.

4. The Employer failed to provide an adequate Excelsior list.

5. The Employer threatened and coerced employees in the exercise of rights guaranteed by Section 7.

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, I caused an investigation of the objections and report as follows:

Objection No. 1

The Union asserted in support of this objection of promises and improvements that two different Plant Managers told employees that they would get a raise if they decertified the Union.

The Union submitted an employee's statement in support of one incident, a conversation between one employee and the former Plant Manager that allegedly occurred on about January 29, which was well in advance of the critical period that commenced with the filing of the Petition on April 11.[3]

In support of the more recent alleged incident(s),[4] the Union named witnesses who it claimed would testify that in about May, the current Plant Manager told a meeting attended by most employees that they would get a raise if they decertified the Union. One employee provided evidence that during at least two meetings, on unspecified dates, with (he guessed) three to four employees in attendance, the Plant Manager stated that the terms that the Employer had offered to the Union were "still out there and if the(y) decide to reject the Union the company would implement the offer." Eleven employees, however, testified that they had never heard the Employer provide any assurance that it would implement its offer if employees decertified the Union.

The sole witness who testified that he had heard the Employer link decertification of the Union with implementation of the proposed contractual terms stated that several other employees had been present on those occasions. The Excelsior list names fifteen employees, three of whom had quit just prior to the election. Eleven employees testified that they had never heard such statements.[5] The totality of the testimony strongly suggests that the sole witness of the alleged linkage may have misheard the statement. At the least, it is fair to say that his testimony stands uncorroborated. In these circumstances, the alleged statement does not raise a substantial and material issue of fact sufficient to warrant a hearing over the fairness of the election.

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[3] The Union made this allegation in the unfair labor practice charge that it filed in 20-CA-32606, a charge dismissed on July 26 for lack of cooperation. The Union did not appeal the dismissal.

[4] The Union raised similar allegations in 20-CA-32727. The Acting Regional Director dismissed that charge on December 21, having determined that the investigation showed that there was insufficient credible evidence to support the allegation. The deadline to appeal was extended to January 24, 2006.

[5] A twelfth employee advised the investigator by telephone that he had not heard any such statement, but he did not return his draft affidavit.

With respect to actual improvements in wages and other conditions of employment, the Union provided a flyer, dated June 29, apparently distributed to employees by the Employer, announcing an "Employee Appreciation B.B.Q." on July 16 that would include a dinner and tickets to a semi-pro baseball game for employees and their family members. Evidence indicates that some employees attended the event, but not that it constituted a benefit that interfered with employees' ability to make a free and reasoned choice in the election that occurred more than two months later.

I, therefore, overrule Objection No. 1.

Objection No. 2

The Union asserted in apparent support of this broad but vague objection that the Employer refused to bargain in good faith by, *inter alia*, failing and refusing to provide an economic proposal and conditioning any economic proposal upon the Union's agreement to all non-economic terms, and by refusing to provide information that the Union had requested. The Union did not, however, provide any evidence or offer of such to support its assertions.[6] Accordingly, I overrule Objection No. 2.

Objection No. 3

[6] The Union also raised bad-faith bargaining allegations in unfair labor practice charges in Cases 20-CA-32606 and 20-CA-32727. As noted above, those charges were dismissed.

The Union did not specify which of the Employer's rules it alleged to be unlawful, much less provide or allude to evidence in support of it. I, therefore, overrule Objection No. 3.[7]

Objection No. 4

The Union asserted that the voter eligibility list provided by the Employer was inadequate because it did not include the phone numbers and e-mail addresses of all employees eligible to vote. The voter eligibility list that the Employer furnished with the names and addresses of all the eligible voters was mailed to all parties, including the Union, on September 13. This list of voters and their addresses sufficed to enable the parties to communicate with all eligible voters in advance of the election.[8] I, therefore, overrule Objection No. 4.

Objection No. 5

In support of this objection that the Employer threatened and coerced employees, the Union asserted that the Employer continually harassed employees by inquiring into their initiation of legal action over its failure to provide rest breaks and meal periods. The Union did not provide evidence in support of this objection, but attached a statement apparently signed by four employees regarding alleged harassment and changes in policy. I note that the statement is dated

[7] Perhaps the Union had in mind the Employer's ethics policy. In Case 20-CA-32448, the Union alleged, among other things, that the Employer unilaterally imposed an ethics policy and required employees to sign for it without first bargaining with the Union, but not that the policy contained illegal rules. In any event, investigation of the charge disclosed the allegation was barred by Section 10(b) of the Act. That charge was dismissed on May 31, and the Union's appeal was denied on September 23.

[8] *North Macon Health Care Facility*, 315 NLRB 359 (1994), *Excelsior Underwear*, 156 NLRB 1236 (1966).

in March, before the commencement of the critical period on April 11.[9] For these reasons, I overrule Objection No. 5.

Summary

For the reasons stated above, I have overruled all of the Objections filed by the Union. I have concluded that the objections do not raise substantial and material issues of fact that must be resolved by means of a hearing. Therefore, I HEREBY ORDER that a majority of the valid ballots have not been cast for the Union, and that it is not the exclusive representative of these bargaining unit employees.

DATED AT San Francisco, California, this 20th day of January 2005.[10]

/s/ *Joseph P. Norelli*
Joseph P. Norelli, Regional Director
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, California 94103

[9] The Union also raised the subject of this objection as allegations in unfair labor practice charges that it filed in Cases 20-CA-32334, 20-CA-32400, and 20-CA-32448. In Case 20-CA-32334, the Union alleged that the Employer coerced and interrogated employees in retaliation for the Union's notice to the Employer of its intention to file a lawsuit in State court over wage claims. The investigation disclosed that after the Union notified the Employer of its intention to sue, the Employer requested to interview the employees involved. During the resulting interview, attended by two union representatives, the Employer sought to investigate the alleged wage claim. The charge was dismissed on April 27 because the questioning was neither threatening nor coercive. The Union's appeal was denied on July 15. The allegation also appeared in Cases 20-CA-32400 and 20-CA-32448. The allegations were dismissed on June 2 and May 31, respectively, because no evidence was submitted to support it. No appeal was filed in the former; the appeal was denied September 23 in the latter.

[10] Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this Decision may be filed with the Board in Washington, D.C., within 14 days. Exceptions thus must be received by the Board in Washington by February 3, 2006. Under the provisions of Section 102.69(g) of the Board's Rules and Regulations, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections and which are not included in the Report, are not part of the record before the Board unless appended to the exceptions or opposition thereto which a party files with the Board. Failure to append to the submission to the Board a copy of evidence timely that evidence in any subsequent related unfair labor practice proceeding.